Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc. and	)	WC Docket No. 02-150
BellSouth Long Distance, Inc. for	)	
Provision of In-Region, InterLATA Services in	)	
The States of Alabama, Kentucky, Mississippi,	)	
North Carolina and South Carolina	)	

COMMENTS OF US LEC CORP.

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SUMMARY

BellSouth's application for Section 271 authority in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina should be denied because BellSouth has failed to demonstrate that its markets are irreversibly open to competitors and because BellSouth continues to discriminate against CLECs in the provision of unbundled network elements, including loop-transport UNE combinations that CLECs are compelled to purchase out of special access tariffs. BellSouth's recent revisions to its SS7 tariffs, and its refusal to exchange SS7 messages on a bill-and-keep basis as it does with other incumbent LECs, are patently discriminatory against CLECs. Further, BellSouth continues to fail to provide local number portability to CLECs without jeopardizing service to the CLEC customer.

Because the Commission has taken the position that BellSouth's refusal to provide UNE combinations to carry exchange access traffic does not violate Commission rules, those Commission rules must be changed. The Commission's restriction on UNE combinations should have been eliminated long ago, and its continued presence impedes local competition. The restriction predates any BOC obtaining 271 authority. Since the establishment of the restriction on UNE combinations, section 271 authority has been granted to BOCs in 15 states, and applications for 271 authority are pending for 12 more states. The time has long since passed since the UNE combination restrictions served any useful purpose. It is clearly not in the public interest to expand the authority of BOCs to provide new services while forbidding CLECs from obtaining UNEs for the provision of exchange access services as permitted by the Telecom Act.

The steady erosion of the separation between checklist compliance and satisfaction of the public interest standard must be reversed. Given the state of the competitive telecom industry, and BOC efforts to thwart the local competition provisions of the Telecom Act, granting

BellSouth Section 271 authority is clearly not in the public interest, and BellSouth's Application should be denied.

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US LEC Corp. ("US LEC") submits these comments concerning the Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance ("BellSouth") for Provision of In-Region, InterLATA Services in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina ("Application").[1] In these comments, US LEC shows that BellSouth's filing does not demonstrate adequate performance or compliance with the competitive checklist of Section 271 of the Telecommunications Act of 1996 ("1996 Act"). Accordingly, the Commission should deny the Application.

[1] Comments Requested on the Joint Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Alabama, Kentucky, Mississippi, North Carolina and South Carolina, Public Notice, WC Docket No. 02-150, DA 02-1453, released June 20, 2002.

I. BELLSOUTH FAILS TO PROVIDE NON-DISCRIMINATORY ACCESS TO DATABASES AND ASSOCIATED SIGNALING NECESSARY FOR CALL ROUTING AND COMPLETION IN VIOLATION OF CHECKLIST ITEM 10

A. Legal Standard

Section 271(c)(2)(B)(x) of the 1996 Act requires a Bell operating company ("BOC") to provide non-discriminatory access to databases and associated signaling necessary for call routing and completion.[2] In analyzing whether a BOC provides non-discriminatory access to databases and signaling for Section 271 purposes, the Commission has established the following standard:

> In the *Second BellSouth Louisiana Order,* we required BellSouth to demonstrate that it provided requesting carriers with nondiscriminatory access to: "(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS);"[3] and to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).[4]

As discussed below, BellSouth fails to provide non-discriminatory access to its databases and associated signaling networks.

B. BellSouth's CCS7 Tariffs in Georgia, Louisiana, Mississippi, and North Carolina are Discriminatory

BellSouth has filed revisions to its tariffs in Georgia,[5] Louisiana,[6] Mississippi,[7] and North Carolina[8] that, for the first time, impose per-message charges for the purported use of

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[2] 47 U.S.C. § 271(c)(2)(B)(x).

[3] *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana,* 13 FCC Rcd 20599, 20753 (1998) (*"Second Louisiana Order*").

[4] *Id.* at 20755-56; *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York,* 15 FCC Rcd 3953 (1999), at ¶ 365 ("*New York 271 Order*").

[5] File Package GA2001-076, File Code 680.3400, effective Feb. 16, 2002.

BellSouth's Signaling System 7 ("SS7") network. These tariff revisions are patently discriminatory, and BellSouth's 271 application must be denied for failure to satisfy checklist item 10.[9]

SS7, called CCS7 by BellSouth, is the industry standard signaling system that uses an overlay network for routing purposes and database access. This out-of band network utilizes packet switching and is separate from the circuit-switched voice network. During call set-up and the duration of a call, SS7 messages are provided equally by the calling party's network and the called party's network from each carrier's Signal Transfer Point ("STP").

In performing its routing function, the SS7 network establishes transmission paths for telephone calls (known as call set-up), and closes (or "tears down") those paths after a telephone call ends. The messages used to perform call set-up and tear down are known as Integrated Services Digital Network User Part ("ISUP") messages.[10] There may be as many as six (6) ISUP messages on each call placed over the public switched telephone network ("PSTN").[11] The

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[6] File Package LA2001-095, File Code 680.3400, effective Feb. 10, 2002.

[7] File Package MS2001-068, File Code 680.3400, effective Jan. 20, 2002.

[8] File Package NC2001-071, File Code 680.3400, filed Jan. 23, 2002. The tariff revisions are pending.

[9] US LEC believes that BellSouth has filed similar tariff revisions in Alabama, Kentucky, and South Carolina, but has not been able to find confirmation.

[10] Newton's Telecom Dictionary (14th ed.) at 393.

[11] The SS7 network begins its functionality by sending an Initial Address Message ("IAM") from the calling network to the called network. This message requests the use of interoffice facilities and contains addressing information. An additional ISUP message known as a Continuity Test Message ("COT") is sent to check facilities. The called network sends the Address Complete Message ("ACM") which confirms the availability of facilities and the terminating equipment of the subscriber. Further, the Answer Message ("ANM") is sent by the called network to confirm the called party has answered the phone (gone off-hook) and the facilities are then "nailed up" and switch resources engaged. Once the call is completed and the called party hangs up the phone, a Release ("REL") message is sent by the called network, which requests the release of the interoffice facilities and the switch resources. The final ISUP message, Release Complete ("RLC"), is sent by the calling network to confirm that all facilities and switch resources have been released.

BellSouth tariff revisions impose per-message charges for ISUP messages on every call, regardless of whether the call originates on BellSouth's network or on a CLEC's network.

The SS7 network also uses Transactional Capabilities Application Part ("TCAP") messages to complete circuit switched calls on the PSTN. TCAP messages provide the signaling function for network databases.[12] TCAP messages are charged to carriers on a "per-dip" basis. That means that when one network sends a database query to another, the provider network charges the other a fee for "dipping" into their database and providing the information. In the CCS7 tariff revisions, BellSouth has imposed charges for each TCAP message, in addition to the existing dip charges related to database queries.

These tariff revisions create a situation that is inequitable and anti-competitive because BellSouth is attempting to recover not only its own costs, but also seeks to charge for services performed and costs incurred by other carriers. Because SS7 signaling is provided jointly by the carriers providing the STPs and the links between the STPs, BellSouth does not own or control all of the SS7 network facilities. Nevertheless, the tariff revisions bill other carriers as if BellSouth did.[13]

Making matters worse, BellSouth exchanges SS7 messages with other incumbent local exchange carriers ("ILECs") on a bill-and-keep basis, but refuses to exchange SS7 messages with US LEC on a bill-and-keep basis (as it did prior to the tariff revisions). A BellSouth representative not only has told US LEC that bill-and-keep arrangements with independent ILECs exist, but has acknowledged that SS7 messages flow in both directions between carriers,

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[12] Newton's Telecom Dictionary (14th ed.) at 707.

[13] *In re: Joint petition of US LEC of Florida Inc., Time Warner Telecom of Florida, L.P., and ITC^DeltaCom Communications objecting to and requesting suspension of proposed CCS7 Access Arrangement tariff filed by*

and are billed under the BellSouth tariffs regardless of network of origination.[14] To accommodate this reciprocal and balanced exchange of SS7 messages, according to BellSouth, US LEC need only bill BellSouth the identical invoiced amounts that US LEC is billed by BellSouth. Nevertheless, BellSouth would require US LEC to establish billing and tracking systems that would ultimately result in a wash of offsetting payments. A bill-and-keep arrangement would accomplish the same result, but BellSouth will not agree to one.

To compound the inequity, BellSouth takes the position that its software can measure SS7 messages, but it currently has not deployed the necessary software to capture and pass sufficient information for any third party (be it a carrier customer, an end user customer or a state commission) to audit the charges assessed, or to identify the costs sufficiently to associate those costs with end user rates. Following the competitive local exchange carriers' ("CLECs") request that BellSouth supply necessary billing detail, BellSouth initially agreed to do so, but at a rate that is prohibitive. BellSouth's quote for the call detail is $30,000 per month per CLEC, or $360,000 per CLEC annualized.[15]

Moreover, BellSouth has contended in regulatory proceedings investigating these charges that these tariff changes are revenue neutral.[16] From the CLEC perspective, these statements are patently wrong. In fact, BellSouth's tariff revisions have imposed significant additional costs on

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BellSouth Telecommunications, Inc., Fla. PSC Docket No. 020129-TP, Direct Testimony Of Wanda G. Montano on Behalf Of US LEC of Florida Inc., filed July 1, 2002 ("Montano Florida Testimony") at 7.

[14] Montano Florida Testimony at 9-10.

[15] Montano Florida Testimony at 7-8.

[16] Montano Florida Testimony at 8. *See also* BellSouth Mississippi Intrastate Tariff Revisions, File Package MS2001-068, File Code 680.3400, effective Jan. 20, 2002 ("With this filing, BellSouth is introducing CCS7 terms, conditions and rates in the Access Tariff as revenue neutral.")

CLECs.[17] BellSouth attempts to shift the charge for the SS7 service from its Commercial Mobile Radio Services ("CMRS") tariffs that apply to CMRS carriers, to carriers who purchase service from the switched access tariff. The switched access tariff is used predominantly by CLECs and Interexchange carriers ("IXCs"). Coincidentally, BellSouth's CMRS affiliate, Cingular Wireless, is the second largest CMRS carrier in the United States, and presumably is the largest CMRS carrier in the BellSouth region, including in each of the five states in this proceeding. The tariff revisions may be "revenue neutral" to the BellSouth ILEC entities, but BellSouth is overtly shifting costs away from its CMRS affiliate onto CLECs and IXCs.

Additionally, in moving the application of the ISUP charges from one class of carriers to another, BellSouth further seeks to shift from a flat-rated "surrogate" charge to a per-ISUP message charge with no cap on how much it can recover. This new form of charging will allow BellSouth to exceed the previous flat-rate charge that theoretically recovered BellSouth's costs previously.

As for TCAP messages, US LEC has not been able to find any corresponding reduction in the database dip charges to represent the offset of the charging for the TCAP messages. Since there are approximately 4 TCAP SS7 messages per call that is dipped, the corresponding reduction in the TCAP dip charge should be 4 times the rate for the TCAP SS7 message.

[17] *See Joint petition of US LEC of Florida Inc., Time Warner Telecom of Florida, L.P., and ITC^DeltaCom Communications objecting to and requesting suspension of proposed CCS7 Access Arrangement tariff filed by BellSouth Telecommunications, Inc.*, Fla. PSC Docket No. 020129-TP, Direct Testimony Of Mark Argenbright on Behalf of WorldCom, Inc., filed July 1, 2002 at 3.

For the foregoing reasons, BellSouth fails to provide non-discriminatory access to databases and associated signaling necessary for call routing and completion in violation of checklist item 10.[18] BellSouth's application should be denied.

II. BELLSOUTH FAILS TO PROVIDE NON-DISCRIMINATORY ACCESS TO UNBUNDLED NETWORK ELEMENTS IN VIOLATION OF CHECKLIST ITEM 2, AND NONDISCRIMINATORY ACCESS TO HIGH CAPACITY LOOPS AND TRANSPORT IN VIOLATION OF CHECKLIST ITEMS 4 AND 5

A. Legal Standard

Section 271(c)(2)(B) of the 1996 Act requires a BOC to provide nondiscriminatory access to network elements in accordance with the requirements of Section 251(c)(3) and 252(d)(1). Section 271(c)(2)(B) also requires BellSouth to provide CLECs with DS-1 facilities for use as both high-capacity loop and transport facilities under checklist items 4 and 5. In evaluating BellSouth's performance for specific loop types such as DS-1 loops, the Commission must consider patterns of systemic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.[19] With respect to unbundled local transport, the Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[20] This Commission has also required that

[18] Even though the NCUC concludes in its Order and Advisory Opinion Regarding Section 271 Requirements that checklist item 10 was uncontested, BellSouth filed its tariff revisions in North Carolina in January 2002, after the hearings in the NCUC 271 proceeding had concluded.

[19] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 122 (Apr. 16, 2001) ("*Verizon Massachusetts 271 Order*").

[20] *Second Louisiana Order* at ¶ 201.

the ILEC must provide all technically feasible capacity related transmission services, including DS-1 transport.[21]

B. BellSouth Fails to Provide Non-Discriminatory Access to High-Capacity Facilities, Thus Forcing CLECs to Purchase Such Circuits as Special Access

BellSouth continues to fail to provide high-capacity facilities to CLECs on a nondiscriminatory basis. High capacity facilities, such as DS-1 and DS-3 loops, multiplexing, and DS-1 and DS-3 transport, are used by CLECs in order to provide affordable, competitive broadband service options to business customers. The Department of Justice has noted the "unique attributes of high-capacity loops, which are key inputs for CLECs competing for business customers."[22] CLECs have attempted to purchase these facilities as unbundled network elements ("UNEs") pursuant to interconnection agreements, but resistance by BellSouth to provisioning of loops, multiplexing, and transport, individually or in combination, has forced CLECs to purchase identical facilities as special access products at prices above total element long-run incremental cost ("TELRIC").[23]

In response to BellSouth's 271 Application for the states of Georgia and Louisiana, US LEC asserted that BellSouth's intransigence in providing high-capacity loops, multiplexing, and transport to US LEC as UNEs, or in converting existing special access circuits to UNEs, violates

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[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*") at ¶ 308.

[22] *Application by SBC Communications Inc, Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provided In-Region, InterLATA Services in Missouri,* CC Docket No. 01-88, Evaluation of the United States Department of Justice at 7, n. 23 (May 9, 2001).

[23] *See* Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp., CC Docket No. 01-321 (filed Jan. 22, 2002) ("*US LEC Special Access Metrics Comments*").

checklist items 2, 4 and 5, access to unbundled network elements, loops, and transport.[24] Even though the Commission chose not to respond to US LEC's comments with regard to special access services in the *Georgia/Louisiana 271 Order*,[25] BellSouth's provision of special access lines to competitors should be an essential component of any review of BellSouth's compliance with the 1996 Act. BellSouth's performance in this area continues to be woeful, and its five-state application should be denied.

US LEC's problems with obtaining special access circuits from BellSouth are well-documented.[26] US LEC would prefer to purchase UNEs rather than special access circuits because UNEs are priced at TELRIC, and special access circuits are not. Numerous impediments prevent this from happening, however.

Primarily, the current rules regarding unbundled loops and loop-transport combinations (enhanced extended links or "EELs") have impeded US LEC's ability to compete with BellSouth. For example, once US LEC has gone through the process of ordering a special access circuit (thus establishing an "existing" combination in the ILEC network) and then has attempted to convert to an EEL, US LEC has encountered seemingly endless obstacles to conversion. When requesting EEL conversions, US LEC has experienced protracted negotiations, delayed conversion requests, threats from BellSouth to impose additional charges (*e.g.*, special access surcharges), and long provisioning intervals. Moreover, BellSouth refuses to provide UNE

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[24] *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, Comments of US LEC Corp. and XO Georgia, Inc., dated March 4, 2002 ("*US LEC Georgia/Louisiana 271 Comments*").

[25] *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana,* CC Docket No. 02-35, Memorandum Opinion and Order (rel. May 15, 2002) ("*Georgia/Louisiana 271 Order*").

[26] *US LEC Georgia/Louisiana 271 Comments* at 11-18.

combinations if US LEC provides any exchange access services on the same facilities to provide local services to an end user customer.

The Commission has stated that "it is not clear" that BellSouth's practices in this regard "violate the Commission's rules."[27] If this were true, then the Commission's rules are having a clear anticompetitive impact and must be changed. The restrictions on the use of UNE combinations deny US LEC the use of an efficient network architecture because it significantly hinders its ability to achieve reasonable economies of scale when US LEC cannot build facilities. The restrictions on UNEs essentially forces CLECs that want to use UNEs in conjunction with access services to instead build parallel and inefficient networks within the existing ILECs networks.

The restriction on the use of UNEs to provide exchange access must be eliminated before any more 271 applications may be granted. The Commission's recent implementation of the local competition provisions of the 1996 Act is failing to promote local competition, is impeding CLECs with unreasonable restrictions on the use of ILEC facilities, and is inappropriately granting BOCs long-distance authority prior to full implementation of the local competition provisions of the 1996 Act. The restrictions on EELs are not required by the 1996 Act and should have no useful purpose at this point. Section 251(c)(3) requires the ILEC to make combined unbundled network elements available "to any requesting telecommunications carrier for the provision of a telecommunications service[.]"[28] The statute does not distinguish between using UNEs for local exchange service and using them for exchange access. The restrictions on EELs were grafted onto the UNE regulations first in 1996 and then again in 1999, "[b]ecause of

[27] *Georgia/Louisiana 271 Order* at ¶ 200.

[28] 47 U.S.C. § 251(c)(3).

concerns that universal service could be harmed if we were to allow interexchange carriers (IXCs) to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges."[29] As Commissioner Furchtgott-Roth said with some prescience two and a half years ago,

> The Commission is concerned that, without the restriction [on the use of EELs], the market for special access services will be undermined, because competitors will be able to offer combinations of network elements as a lower-priced substitute for incumbents' special access services. I believe that there are other ways that the Commission could have addressed this concern consistent with the statute. Since the problem stems from the Commission's rules for access charges, the obvious answer is a prompt revision of those rules, so that incumbent carriers are no longer required to include implicit subsidies in their prices for access services. . . What the Commission may not legally do, however, is impose restrictions on the ways in which requesting carriers may use the network elements that they purchase from incumbents.[30]

That was two and a half years ago, and prior to any BOC obtaining section 271 authority. Since then, Verizon has obtained 271 authority in eight states, SBC has obtained 271 authority in five states, and BellSouth has obtained 271 authority in two states. Applications for additional 271 authority are now pending for Verizon, BellSouth and Qwest for another 12 states. Yet the restrictions on the use of EELs have not changed. Indeed, the BOCs have now engaged CLECs in litigation regarding compliance with the restrictions on EELs to place further restrictions on their use.

While BOCs obtain section 271 authority with nary a consideration of the general public interest implications of granting 271 relief while remaining aspects of the 1996 Act go unaddressed, CLECs are completely hamstrung in their ability to access unbundled network

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[29] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) at ¶ 2.

[30] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760 (1999), Dissenting Statement of Commissioner Harold Furchtgott-Roth.

elements for the provision of local exchange service and exchange access as required by the Act. The Commission's access charge and universal service reforms are largely set in place for three more years,[31] so that CLECs have no recourse to challenge the restrictions related to UNE loop and transport combinations while the BOCs are given the "carrot" of purported compliance with Section 251. Commissioner Furchtgott-Roth also recognized this problem:

> The Commission postpones yet again a decision on how to solve a problem created by last year's *UNE Remand Order*, which requires incumbent local exchange carriers to offer loop/transport combinations as unbundled network elements. . . . I believe that postponing a decision on the merits of this issue violates the timetable for establishing unbundling requirements set forth in the 1996 Act. Specifically, the statute requires the Commission to implement section 251's requirements expeditiously, thereby giving carriers certainty regarding their obligations and rights under the 1996 Act. *See* 47 U.S.C. § 251(d)(1) ("Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section."). Since 1996, the Commission has ignored this statutory directive with respect to this special access issue. In the *Local Competition First Report & Order*, it refused to resolve the problem and instead asked interested parties to submit comments. It punted again last fall, when it ruled that the record needed further development in order for it to resolve the issue.
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> Yet again, the Commission avoids answering this question. It claims to need more time to "compile an adequate record for addressing the legal and policy disputes presented here." *Supplemental Order Clarification* ¶ 1. I do not understand why. Both the *Local Competition First Report & Order* and last year's *UNE Remand Order* asked parties to comment on whether there is any statutory basis for "limiting an incumbent LEC's obligation to provide entrance facilities as an unbundled network element." *See id.* ¶ 495. Interested parties have had a more than adequate opportunity to weigh in on the issue, and to the extent that empirical evidence informs this issue, parties have submitted such data. There is no reason why the Commission cannot answer this question today

[31] *Access Charge Reform; Federal-State Joint Board on Universal Service*, 15 FCC Rcd 12962 (2000) ("CALLS Order"); *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2000) at ¶ 97 ("The CALLS plan established, for the period July 1, 2000 through June 30, 2005, interstate access rate levels and an aggregate amount of interstate universal service support for ILECs subject to price cap regulation. The Commission recently sought comment on an industry-sponsored access reform and universal service proposal for all other ILECs; this plan would, if adopted, be implemented over a five-year period.")

> – no reason, that is, other the Commission's agreement with the incumbent carrier members of CALLS that it would delay resolution of this matter until next year.[32]

It is abundantly clear that the Commission must restore some order to the process of implementing the 1996 Act. The public interest requires that the Commission must stop granting section 271 applications while important access charge and universal service reforms, which directly implicate section 251 and local competition concerns, remain unattended. It is clearly not in the public interest to expand the authority of BOCs to provide new services while forbidding CLECs from obtaining UNEs for the provision of exchange access services as permitted by the Telecom Act. Any other approach will inevitably return the telecom industry to the status quo prior to the 1996 Act, and conceivably to the status quo prior to the AT&T Consent Decree.

III. BELLSOUTH FAILS TO PROVIDE SPECIAL ACCESS FACILITIES AT PARITY

The Commission should suspend further consideration of all Section 271 applications until the Commission eliminates the exchange access restriction on EELs. To the extent the Commission decides to continue to evaluate Section 271 applications, the Commission must consider BellSouth's provision of special access services. As discussed, BellSouth's anticompetitive tactics force US LEC to purchase special access circuits in lieu of UNE loop, multiplexing, and transport combinations. Even when CLECs purchase special access facilities, however, CLECs encounter substandard and discriminatory provisioning and maintenance that significantly impacts their ability to compete. US LEC is one of BellSouth's primary facilities-based competitors, spending in excess of $38 million annually to purchase services from

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[32] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000), Dissenting Statement of Commissioner Harold Furchtgott-Roth.

BellSouth. While one would think that a customer of this magnitude would receive high quality service, BellSouth provisions these facilities to US LEC in a discriminatory manner since it knows that this Commission has heretofore declined to evaluate a BOC's special access provisioning. Regardless of how the facilities are characterized, CLECs are enduring pervasive problems in the provisioning and repair of the facilities. US LEC's experiences demonstrate that BellSouth's inadequate wholesale performance pervades all aspects of BellSouth's special access provisioning.

A. The Need for Monitoring of Special Access Provisioning

The Commission should reevaluate its blanket exclusion of special access services from Section 271 Competitive Checklist considerations. The Commission based its exclusion on the following:

> Although dedicated local transport and the interoffice portion of special access are generally provided over the same facilities, they differ in certain other respects. A number of these parties, however, assert that the checklist requirements focus on the provision of physical facilities, not the regulatory classifications that apply. We do not believe that checklist compliance is intended to encompass the provision of tariffed interstate access services simply because these services use some of the same physical facilities as a checklist item.[33]

The line between special access facilities and DS-1/DS-3 UNE facilities is increasingly becoming irrelevant for regulatory purposes. As one commenter notes:

> The "special access line" is largely a consequence of the interLATA line-of-business restriction that BellSouth seeks to have removed in this proceeding. In simple terms, customers make two types of calls: local calls and long distance calls. Many larger customers separate these calls between two types of connections – so called "switched access lines" (for calls that BellSouth can handle), and "special access lines" (for calls that BellSouth cannot). This

[33] *New York 271 Order* at ¶ 340.

> distinction, however, does not fundamentally change the service the customer is receiving, it only changes which carrier (BellSouth or a long distance company) terminates the call. Significantly, CLECs typically offer integrated services that render any distinction between "switched" and "special" lines irrelevant – CLEC lines are both "switched" and "special" because they handle both local and long distance calls.[34]

Thus, regardless of how the facility is characterized from a regulatory or tariffing perspective, the CLEC uses the facility to provide the same essential functions. This Commission has itself recognized that "incumbent LECs routinely provide the functional equivalent of an EEL through their special access offerings."[35] The Georgia Public Service Commission ("Georgia PSC") has also found that "special access circuits and DS-1 combos are the same thing."[36] Further, in a workshop conducted by the Georgia PSC in November 2001, Jerry Hendrix of BellSouth admitted that the only difference between a UNE combination and a special access circuit was pricing. SBC and Qwest provide the same provisioning intervals for special access and DS-1 combinations.[37] Thus, it is an anomaly for the Commission to scrutinize a BOC's performance for facilities when they are classified in one category, but to not evaluate its performance for those same facilities when they are classified in another category.

The situation is particularly troublesome when the CLEC is forced to order the facilities as special access facilities rather than as UNEs. Provisioning intervals for DS-1 UNEs are much longer than retail special access intervals, thus forcing CLECs to order higher priced special

[34] *Georgia PSC 271 Proceeding,* Reply Comments of the Southeastern Competitive Carriers Association (July 16, 2001), ("*SECCA Georgia PSC Reply Comments*"), Affidavit of Joseph Gillan at ¶ 16 ("*Gillan Affidavit*").

[35] *UNE Remand Order* at ¶ 481.

[36] *Re MCIMetro Access Transmission Services, LLC,* Docket No. 11901-U, Order on Reconsideration (Ga. PSC) 2001 WL 1021085, *2 (April 17, 2001) ("*MCImetro GA Order*").

[37] *Id.*

access services to obtain shorter provisioning intervals that are competitive at the retail level. In addition, if a CLEC wants to utilize UNE multiplexers, it must purchase special access circuits.

The Commission's position is particularly damaging given the difficulties CLECs have been experiencing with regard to the provisioning of special access services. While the Commission is currently examining whether to adopt special access performance standards, there is no guarantee that it will adopt any. ILECs have argued that this Commission has exclusive jurisdiction over mixed-use special access facilities and denies that state commissions have jurisdiction over such facilities.[38] Thus, these facilities fall into a regulatory "black hole" if a state finds it has no jurisdiction over mixed access facilities, and this Commission declines to set standards for special access provisioning. This unfortunate reality provides even more of a perverse incentive for BellSouth to coerce CLECs into ordering higher priced special access.

B. Ordering/Provisioning of Special Access Facilities

US LEC monitors BellSouth's provisioning of high capacity facilities in both the ordering and actual delivery phases, and BellSouth's provisioning of T-1s in three specific areas. The first is firm order confirmation ("FOC") interval. US LEC designed this metric to measure BellSouth's ability to meet an interval of 48 hours to return a FOC, except for project-managed orders and local interconnection trunks.[39] In January 2002, 22% of US LEC orders had the FOC returned beyond the 48-hour interval; in February 2002, 25% of the orders were returned beyond

[38] *See, Investigation by the Department of Telecommunications and Energy on its own motion, pursuant to G.L. c. 159, §§ 12 and 16, into Verizon New England Inc. d/b/a Verizon Massachusetts' provision of Special Access Service,* Docket No. 01-34 (Mass. DTE), AT&T Communications of New England, Inc.'s Response to Verizon's Comments at 2 (April 30, 2001) ("*AT&T Massachusetts Response*").

[39] The 48-hour interval is an industry standard, and is the interval that BellSouth uses to report performance on its website.

the interval; and in March 2002, 27% of the orders were returned beyond the interval. Clearly, these are unacceptable intervals and impact a CLEC's ability to manage installation of services for its customers.

US LEC also measures BellSouth's ability to provide a firm order confirmation that matched US LEC's requested due date or customer desired due date. In January 2002, 8% of the FOCs did not meet the requested due date; in February 2002, 7% did not; and in March 2002, 10% of the FOCs did not meet the requested due date. US LEC also reviewed BellSouth's ability to install in accordance with US LEC's requested due date. The facility acceptance date should be the day BellSouth delivers the circuit to US LEC. In January 2002, for 21% of the orders, the acceptance date did not match the requested due date; in February 2002, the requested due date did not match the acceptance date for 22% of the orders; and in March 2002, the percentage was 25%. For January, February and March 2002, BellSouth missed one business date per month on average. Again, these performance results are clearly unacceptable.

US LEC has also encountered numerous instances of "blind FOCs." A blind FOC is when BellSouth sends US LEC a firm order confirmation date, and then on or near the delivery date notifies US LEC that the facility is not available and will not be delivered on the date. Based on the FOC received early on in the special access ordering process, US LEC will have scheduled the cut-over date with the customer and will have prepared to handle the cut-over by making arrangements with its technicians, the staff of its customer, and the technicians who support the customer's customer-premise equipment. BellSouth simply cancels the date without explanation. This failure of BellSouth is not merely a matter of inconvenience, but one that wastes valuable time and resources of both the CLEC and the customer. Furthermore, the customer will not know the cause of the delay and will in all likelihood blame the CLEC. The delays in the ordering and provisioning of these facilities clearly impact the competitive position of CLECs and BellSouth has every incentive to engage in substandard provisioning, especially if it knows its performance is not monitored by this or any other Commission.

US LEC also has experienced continuing problems with circuits that are experiencing "infant troubles," or in BellSouth's terminology "turned up broke" ("TUB"). When this occurs, the CLEC is placed in the middle between the provisioning center that refuses to work the trouble on the grounds that its responsibility was to provision the circuit, which it did, and the repair center that does not want to accept a trouble ticket for a circuit that has never worked. Hours go by while the CLEC waits for one of the BellSouth organizations to accept responsibility.

Moreover, what cannot be found in any data submitted by BellSouth is the number of customers that stay with BellSouth and cancel their order with the CLEC as a result of these delays caused by BellSouth. If the customer decides to cancel its order with the CLEC, its only near-term option is to stay with the monopoly provider.

C. Maintenance of High Capacity Facilities

In the North Carolina Utilities Commission ("NCUC") 271 proceeding, US LEC documented the severe problems it experiences with BellSouth's maintenance and repair of high capacity facilities.[40] When a customer reports an outage, it contacts US LEC. US LEC opens an internal trouble ticket and investigates the problem. When the trouble is isolated to BellSouth's network, US LEC opens a trouble ticket with BellSouth. From January 2002 to June 2002, US

[40] *North Carolina Utilities Commission 271 Proceeding,* Comments of US LEC Corp., Affidavit of James M. Hvisdas (Oct. 26, 2001).

LEC experienced 131 outages on these circuits in North Carolina, Kentucky, and Alabama that US LEC determined were due to problems on BellSouth's network. Further, BellSouth fails to come close to its tariffed Mean Time To Repair ("MTTR"). US LEC's data shows that for the outages from January 2002 to June 2002, the mean time to repair in Alabama, Kentucky, and North Carolina was 7 hours and 57 minutes. BellSouth's tariffed MTTR is 4 hours. Outages of this frequency and duration imperil competition for customers who need high-capacity facilities. Since these facilities are used for vital business services, any protracted outage negatively impacts the CLEC's ability to keep the customer or obtain new ones, as well as the CLEC's reputation and brand.

Many of the outages appear to be due to gross human error on the part of BellSouth. In fact, during the October 18, 2001 weekly call during which US LEC and BellSouth review the outages from the preceding week, BellSouth representatives stated that in a review of 463 trouble tickets, 50% of US LEC's outages were the direct result of human error. It is not clear why the problems are being caused, and BellSouth's escalation process is very deficient. Moreover, BellSouth technicians are apparently making these errors in spite of internal safeguards such as alarm and warning signals prior to taking live circuits down. Outages due to human error can be prevented through better training and supervision. The fact that the outages have not been abated demonstrates BellSouth's disregard for service quality.

These outages are putting CLEC customers out of service for days and give customers the undeserved impression that CLECs cannot provide quality service. Customers do not care if BellSouth is the cause of the problem; the customer has purchased reliable service and quick restoration of service when problems occur.

IV. BELLSOUTH FAILS TO PROVIDE ADEQUATE NUMBER PORTABILITY IN VIOLATION OF CHECKLIST ITEM 11

Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with number portability requirements of section 251 as implemented by the Commission. Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[41] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[42] In the *Second Louisiana Order*, this Commission found that BellSouth failed to meet Checklist Item 11 because of its poor performance in coordinating provision of loops with number portability.[43]

US LEC has had a number of problems when a new US LEC customer ports fewer than all of its lines to US LEC. The situation occurs most frequently when the customer subscribes to an alarm monitoring service provided by BellSouth. US LEC does not provide an alarm monitoring service, so those lines must remain with BellSouth when the customer switches its other lines over to US LEC. BellSouth, however, appears to be incapable of handling a partial migration of a customer's lines. BellSouth continues to send bills to the customer as if the customer had not switched to US LEC.

In addition, BellSouth seems incapable of handling changes to a cutover request. Sometimes a US LEC customer needs to reschedule its transition to US LEC. For example, the

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[41] *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶ 369 (June 30, 2000) ("*SBC Texas 271Order*").

[42] *Id.*

customer may need to postpone installation of customer premises equipment, or accommodate the schedules of vendors or technicians. US LEC then provides BellSouth with timely notification of the change. BellSouth, however, routinely fails to change the cutover request and disconnects the line from BellSouth facilities. The result is a complete loss of service to the customer, which could have been avoided by better cooperation from BellSouth.

In addition, BellSouth's internal controls fail to capture BellSouth's own changes to its delivery schedule. When BellSouth changes the facility due date, it often fails to link the number portability order associated with the facility with the change in the facility due date. This can result in the customer being taken out of service when the number is ported prior to the facility being delivered. As a result, US LEC has implemented a policy that delays entering the Local Service Request into BellSouth's system until it can be assured that the FOC date is met and the facility delivered. Should BellSouth meet its FOC date, the facility sits for some period of time unused by the customer and paid for by US LEC. This is a penalty competitors must pay for having an unreliable vendor. CLECs should not have to go through such machinations, and would not have to if BellSouth provided reliable number portability.

BellSouth's effort to remedy this poor performance unlawfully places the financial burden to implement LNP squarely on the CLEC. BellSouth has implemented a new policy that any "coordinated LNP cuts" that are to be performed at any time other than 8:00 AM to 5:00 PM are subject to new hourly surcharges. A new BellSouth entity called "BellSouth Professional Services" has billed US LEC $300 for the first hour of service implementing the coordinated LNP cut and $150 for each additional hour. These charges are in addition to the technician's charges that US LEC already pay for LNP cuts.

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[43] *Second Louisiana Order* at ¶ 279.

Further, BellSouth insists that US LEC sign a "Quote Sheet" that states that each carrier agrees to these charges. BellSouth refuses to process US LEC's LNP orders unless US LEC signs a Quote Sheet. These "BellSouth Professional Services" surcharges do not appear in BellSouth's tariffs, and there is no reference to them in US LEC's interconnection agreements.

Moreover, an overwhelming majority of US LEC's coordinated LNP cuts fall outside the time window established by BellSouth. BellSouth's imposition of onerous surcharges on these coordinated LNP cuts suggests that the new surcharges are designed solely to impede the growth of CLECs like US LEC. These charges are unlawful because, if allowed to remain in effect, will preclude meaningful competition. BellSouth's performance deficiencies are particularly troubling because, as the Commission has noted, number portability is essential to meaningful competition and provides consumers flexibility in the way they use their telecommunications services.[44]

V. BELLSOUTH'S APPLICATION IS NOT IN THE PUBLIC INTEREST

A. The Standard

Under Section 271(d)(3)(C) of the Act, the Commission may not grant Section 271 authorization unless it is consistent with the "public interest, convenience and necessity."[45] This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.[46] The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating section 271

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[44] *In the Matter of Telephone Number Portability*, 11 FCC Rcd. 8352, ¶ 28 (1996).

[45] 47 U.S.C. § 271(d)(3)(C).

[46] *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."[47] As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."[48] The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC's decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."[49]

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[50] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[51] The Commission explicitly recognized that "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[52]

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47 *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("*Ameritech Michigan 271 Order*").

48 *Id.* at n. 992, *quoting*, S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

49 *Id.*

50 *Ameritech Michigan 271 Order* at ¶ 383.

51 *Id.* at ¶ 385.

52 *Id.*

Predictably, the BOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.[53] BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.[54] The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."[55] The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[56] As the Department of Justice notes, in-region interLATA entry by a BOC should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[57]

Senators Burns, Hollings, Inouye, and Stevens reaffirmed the importance of the public interest standard in a letter to Chairman Powell.[58] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that

[53] *Second Louisiana Order,* at ¶ 361.

[54] *Id.*

[55] *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

[56] *Ameritech Michigan 271 Order* at ¶ 386.

[57] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[58] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001).

> authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[59]

The Commission has traditionally focused on both the current state of competition in a particular market and assurances of future compliance to ensure future competition in evaluating the public interest standard.[60]

More recently, however, the Commission has weakened the public interest standard and has adopted positions consistent with the BOC attempts to subsume the public interest analysis under considerations of checklist compliance. In the *Georgia/Louisiana 271 Order*, the Commission virtually tied approval to checklist compliance: "[A]lthough the Commission must make a separate determination that approval of a section 271 application is 'consistent with the public interest, convenience, and necessity,' it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B)."[61]

Further, the Commission has given applicants substantial latitude in demonstrating such checklist compliance. The Commission has allowed applicants to incorporate interconnection terms and conditions,[62] rates,[63] and even performance data[64] from another state to demonstrate checklist compliance in a particular state. The Commission has also increasingly allowed

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[59] *Id.* at 3.

[60] *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, (Jan. 22, 2001) ¶¶ 266-281 ("*SWBT Kansas/Oklahoma 271 Order*").

[61] *Georgia/Louisiana 271 Order* at ¶ 280.

[62] *SWBT Kansas/Oklahoma 271 Order* at ¶ 35.

[63] *See id.* at ¶ 82, n. 244.

[64] *See id.* at ¶¶ 35-38.

applicants to rely on promises of future compliance.[65] As a result, the checklist has increasingly become a formula where if the applicant can plug in the correct inputs it can obtain Section 271 authority.

The Commission has determined that this latitude is warranted. US LEC is not here to second-guess that determination, but to merely reiterate that this is all the more reason for a viable public interest standard. With the mounting number of metrics to consider, it is inevitable that the process will only continue to grow more mechanistic. As checklist compliance becomes all the more mechanistic, it is all the more important that a viable public interest standard be preserved.

The public interest standard will enable the Commission to look beyond the numbers and look at the qualitative aspects of the application. The Commission will be able to consider if the application, when looked at as a whole, truly promotes competition and is in the public interest. For instance, the North Carolina Advisory Opinion is replete with references to missed metrics that the NCUC did not deem to be competitively significant. Assuming arguendo that those missed metrics individually were not competitively significant, when combined they do take on a competitive significance.

Promoting CLEC market entry should be a paramount goal of the Commission. Competitive entry into local markets promotes increased choices for end users and promotes innovation and demand for services. For instance, CLECs have fueled the growth of advanced services and broadband deployment by deploying state-of-the-art networks. Prior to competitive entry, the BOCs were disinterested in advanced services and broadband deployment; now they

[65] *See, Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA*

fill airwaves advocating greater broadband deployment. The Act was intended to provide for a "pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[66] The goal of promoting competition was to "secure lower prices and higher quality services for American telecommunications consumers."[67] As the House Commerce Committee Report noted:

> Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.[68]

Competitive entry into markets has helped make the goals a reality, and the Commission has played a significant role in effecting these goals. The Commission, however, cannot ignore those goals now.

The Commission cannot deny that local competition is imperiled and that competitive exit from local markets is not in the public interest. For this reason, the Commission should reconsider this misguided statement from the *Georgia/Louisiana 271 Order*:

> Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the financial hardships of the competitive LEC community do not undermine that showing. We have consistently declined to use factors beyond the control of the BOC, such as the weak economy, or over-investment and poor business planning by competitive LECs to deny an application.[69]

This statement indicates an almost complete abandonment of any public interest standard. Checklist compliance is a requirement, but it is not the only requirement for section 271

Services in Pennsylvania, Dissenting Opinion of Commissioner Michael J. Copps at 8 (September 19, 2001).

[66] P.L. 104-104, Telecommunications Act of 1996, S. Conf. Rep. 104-230 at 1 (1996).

[67] P.L. 104-104, H.R. Rep. 104-204(I) at 160 (1995).

[68] *Id.*

approval. The Commission must consider BOC applications within the context of the current telecommunications industry. The CLECs that remain in business provide the only hope for intramodal competition in local markets as BOCs have been refusing to compete in each other's regions. With the long distance industry in turmoil, and the increasing possibility that now two of the large three long distance carriers, particularly WorldCom and perhaps even AT&T, will be purchased by a BOC, the vision for the 21st century is fast becoming a return to the pre-1980s America.

The 1996 Act was designed to provide end users with a number of competitive choices and services. As Commissioner Copps has stated:

> The combination of competitive BOC entry into the interLATA market and competitive local exchange carrier (CLEC) entry into the BOC's once-dominant local market, Congress believed, would lead to significant consumer benefits in the form of lower prices, better service, and investment in new technologies. Continued BOC dominance of a state's local market, however, could undermine consumer benefits if the BOC could leverage this dominance upon entering the interLATA market.[70]

If the Commission allows the Section 271 process to continue to be diluted, end users will be seeing a landscape dominated by the BOCs each seeking to maintain their monopolies in their regions. The Commission was given the ability to prevent such a scenario through use of the public interest standard. The Commission should employ this standard to ensure that local markets are irreversibly open to competition. The steady erosion of the separation between checklist compliance and satisfaction of the public interest standard must be reversed. Given the state of the competitive telecom industry, and the BOC efforts to thwart the local competition

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[69] *Georgia/Louisiana 271 Order* at ¶ 282.

[70] *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, Dissenting Opinion of Commissioner Michael J. Copps at 1 (September 19, 2001).

provisions of the Telecom Act, granting BellSouth Section 271 authority is clearly not in the public interest, and BellSouth's Application should be denied.

B. The Current State of Local Competition

BellSouth may obtain authority to provide long-distance service only when competition has rendered its local markets irreversibly open. BellSouth's own conduct demonstrates that has not happened.

BellSouth's ability to raise prices for special access is prima facie evidence of a lack of local competition. In December 2000, BellSouth was granted pricing flexibility for special access services in 39 metropolitan statistical areas, including Birmingham, Huntsville, Mobile, and Montgomery, Alabama; Louisville, Kentucky; Biloxi-Gulfport, and Jackson, Mississippi; Asheville, Charlotte-Gastonia, Greensboro-Winston-Salem-High Point, Raleigh-Durham, and Wilmington, North Carolina; Charleston-North Charleston, Columbia, and Greenville-Spartanburg, South Carolina; the Augusta, Georgia MSA that includes parts of South Carolina; and the Columbus, Georgia MSA that includes parts of Alabama.[71]

As the CLEC community predicted, BellSouth has raised prices for special access in areas where it has been granted pricing flexibility. Within a year, BellSouth instituted wide-ranging price increases for key special access services so that prices for these products in areas where BellSouth has been granted pricing flexibility are significantly higher than in other areas. For example, BellSouth now charges $168.00 per month for a DS-1 local channel in Zone 1 in areas where it has obtained pricing flexibility, whereas it charges $135.00 for the same service in

[71] *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, 15 FCC Rcd 24588 (2000), n.25.

areas where it has not obtained pricing flexibility.[72] Because of these nearly across-the-board rate increases, BellSouth now charges in areas where it has obtained pricing flexibility higher amounts in every pricing zone for DS-1 local channels, Interoffice Channel (fixed), Interoffice Channel (mileage), and Channelization (DS-1 to DS-0) than in areas where it has not obtained pricing flexibility. BellSouth also has higher rates in areas where it has obtained pricing flexibility for a number of components of its term commitment plans, and its fiber ring services.[73] Clearly, BellSouth faces little or no competition in the markets where it has been granted pricing flexibility as evidenced by its ability to raise prices.

US LEC made a substantially similar argument in the Georgia/Louisiana 271 proceeding,[74] and the Commission did not consider it. It is simply not possible to reconcile a conclusion that BellSouth's markets are open to competition while also conceding that BellSouth feels such little competitive threat that it can raise prices for special access services in the local exchange.

C. The Danger of Premature Entry

The Commission should also be vigilant to ensure against the danger of a premature grant of Section 271 authority. If a BOC is allowed into the long distance arena before a local market

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[72] *Compare* BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, Access Service, 23-Metropolitan Statistical Area Access Services, 1st Revised Page 23-80, *to* Tariff F.C.C. No. 1, Access Service, 7-Special Access (a.k.a BellSouth SPA) Service, 7th Revised Page 7-144.1. Rates for DS-1 local channels in Zone 2 are $175.00 per month in MSAs with pricing flexibility, and $145.00 in MSAs without pricing flexibility. *Id.* Rates for DS-1 local channels in Zone 3 are $180.00 per month in MSAs with pricing flexibility, and $155.00 in MSAs without pricing flexibility. *Id.*

[73] These rate differences were provided with US LEC's comments opposing Verizon's petition for special access pricing flexibility. Joint Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp., *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, CCB/CPD File No. 01-27 (Dec. 14, 2001).

[74] *US LEC Georgia/Louisiana 271 Comments* at 52-53.

is irreversibly open, local competition will not develop, and long distance competition could be imperiled.[75] As Dr. Mark N. Cooper of the Consumer Federation of America noted:

> [t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or 'competitive imbalance,' in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.[76]

As the Commission has also noted:

> Section 271, however embodies a Congressional determination that, in order for this potential to become a reality, local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.[77]

While a BOC's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market is open to competition after BOC entry.[78] The future of competition is not promising in the BellSouth region. As Mr. Gillan forecasts:

> Not only does the level of competition today not justify BellSouth's claim that is has opened markets to entry, the most likely effect of BellSouth's gaining interLATA authority would be for it to gain even greater dominance in the future.

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[75] *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service,* California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001).

[76] *Id.*

[77] *Ameritech Michigan 271 Order* at ¶ 388.

[78] *Id.* at ¶ 390.

> Unless entrants are assured nondiscriminatory access to the inherited network, only BellSouth would be positioned to offer packages that combine local service with other products (such as Internet access and long distance) broadly across the market. Consequently, granting BellSouth interLATA authority will increase its market position at the very *same* time that the Act's sole financial incentive to comply with its market opening provisions is removed.[79]

BellSouth's poor provisioning of facilities, as documented in these Comments, will only serve to preclude the development of viable competition in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina. CLECs will need to rely on provisioning of facilities from BellSouth until they can deploy their own facilities. CLECs' use of their own facilities should increase over time as CLECs build out their own networks. There will always be reliance upon BellSouth for some portion of the circuit, typically the last mile to the customer's premise. The purchase of unbundled network elements will serve as a bridge that will provide CLECs "with the ability to gain a sufficient volume of business to justify economical deployment of their own facilities."[80] As Justice Breyer noted in *Iowa Utilities Board*:

> [o]ne can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition . . . .[81]

BellSouth's practices impede this "sharing" of the basic facilities necessary to provide competitive telecommunications service.

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[79] *Gillan Affidavit* at ¶ 7.

[80] *UNE Remand Order* at ¶¶ 52.

[81] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 416-417 (Breyer, J., concurring in part/dissenting in part).

As the FCC has noted, requiring CLECs to self-provision facilities such as loops would "materially raise entry costs, delay broad-based entry, and limit the scope and quality of a competitor's offerings," and is "not an adequate alternative for loops that a carrier can obtain from an incumbent LEC."[82] BellSouth's poor provisioning of these facilities delays the expansion of CLEC business, which delays the rollout of their own facilities and in turn thwarts facilities-based competition.

D. BellSouth's Proposed Deposit Requirements are Unjust and Unreasonable

BellSouth's anticompetitive conduct is also evident in the proposed tariff revisions it filed with the Commission recently.[83] BellSouth's proposed revisions to Section 2.4.1 of its Tariff F.C.C. No. 1 ("FCC 1") provide that:

> based on [BellSouth's] review if the Customer's credit worthiness or if the Customer has a proven history of late payments to [BellSouth] or if the Customer does not have established credit, BellSouth reserves the right to secure the account with a security deposit. Such security deposit shall take the form of cash. Such deposit may not exceed the actual or estimated rates and charges for the service for a two month period.[84]

The proposed deposit provisions are markedly inferior to the existing provisions, which are based on the established behavior of the customer, rather than BellSouth's subjective evaluation: "[BellSouth] will . . . only require a customer which has a *proven history of late payments* to [BellSouth] or does not have established credit to make a deposit . . . ."[85]

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82 *UNE Remand Order* at ¶ 181.

83 BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, Transmittal No. 635. US LEC has filed a Petition to Reject or Suspend and Investigate the proposed tariff revisions.

84 Transmittal 635 § 2.4.1(A).

85 FCC 1, § 2.4.1(A), 3rd Revised Page 2-21 (issued Apr. 9, 2002) (emphasis supplied).

The current provisions also have the advantage of being based on objective criteria, under the customer's control, as opposed to the proposed provisions, which are subject to BellSouth's sole discretion. Transmittal 635 provides no definition of what constitutes "credit worthiness," nor does it provide the customer with any opportunity to refute or appeal BellSouth's unilateral determination that a customer is not "credit worthy." In fact, Transmittal 635 leaves open the possibility that a customer could have met the standards of creditworthiness by any number of independent ratings organizations, (e.g. Dun and Bradstreet) and yet be deemed unworthy by BellSouth, for whatever reasons that BellSouth might devise. It is also perverse that BellSouth proposes to use a customer's record of success to establish a lack of credit worthiness—BellSouth reserves the right to collect additional security if a customer grows its business and increases its monthly billing.

In fact, under the proposed provisions, the customer's actual history with BellSouth is *immaterial* to the decision to require a deposit. This supports the suspicion that these provisions are not predicated on a legitimate business need, but instead are part of BellSouth's knee-jerk response to a billing and collection problem of its own making, which BellSouth seeks to transfer to CLECs.

Further, BellSouth's proposed revisions to Section 2.4.1 of its FCC 1 Tariff provide that "in the event a new or existing customer fails to remit to BellSouth any deposit requested pursuant to this Section, service to that Customer may be terminated . . . and any security deposits will be applied to the Customer's account."[86] Thus, BellSouth is the judge and jury. Under the terms of this provision, BellSouth can unilaterally determine, based on unknown criteria, that a deposit is required, and then unilaterally disrupt a long-standing business relationship to the detriment of not only the CLEC customer, but the end-user customers of that CLEC. No such penalty is found in the current tariff. The discretion accorded to BellSouth under the proposed tariff is unjust and unreasonable because it provides no meaningful restraint on its ability to impose deposits for anticompetitive purposes.

In addition to providing for an increase in the amount of an existing deposit at BellSouth's sole discretion, Transmittal 635 also provides that the "security deposit shall take the form of cash"[87] and "will not exceed in total the rates and charges for two months of the Customer's estimated billing for services."[88] Given that it is not uncommon for a customer to generate millions of dollars in monthly billings, these requirements are extremely burdensome.

The unreasonableness of the proposed revisions are underscored by the fact that BellSouth is a debtor to CLECs as well. Unfortunately, the CLEC community has never had the leverage to insist on deposits from BellSouth to cover its obligations. Instead, CLECs have had to carry crushing amounts of receivables from BellSouth and fight them in legal proceedings to collect,[89] often settling for pennies on the dollar. Now BellSouth is attempting to make this imbalance even worse by unilaterally extracting millions of dollars in cash from CLECs as a condition of merely maintaining an existing business relationship, let alone initiating a new one.

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[86] Transmittal 635, § 2.4.1(B).

[87] Transmittal 635 § 2.4.1(A).

[88] *Id.*

[89] *See, e.g.* Complaint of US LEC of Georgia, Inc., Docket No. 9577-U, *Order*, (Ga. P.S.C Jun. 16, 2000), *affirmed* BellSouth Telecomms., Inc. v. US LEC of Georgia, Inc., Civil Action No. 1:00-cv-1781-GET (N.D. Ga. 2001); BellSouth Telecomms., Inc. and US LEC, Inc., Docket No. P55, Sub 1027, *Order Concerning Reciprocal Compensation for ISP Traffic*, (N.C.U.C. Feb. 26, 1998); Petition of MCIMetro, *Order Deciding Complaint*, Docket No. 6865-U, (Ga. P.S.C. December 28, 1998); Complaint of MFS Intelenet of Georgia, Inc., *Order Affirming and Modifying the Hearing Officer's Decision*, Docket No. 8196-U (Ga. P.S.C. Dec. 28, 1998); *BellSouth Telecomms., Inc. v. ITC DeltaCom Comms., Inc.*, Civ. Action No. 99-D-287-N, Memorandum Opinion and Order (M.D. Al. Nov. 15, 1999).

BellSouth's unreasonable demand for significant cash deposits from CLECs demonstrates BellSouth's intent to hobble its competitors at every conceivable opportunity. Granting BellSouth's application is clearly not in the public interest as long as BellSouth continues to engage in such blatantly disruptive and anticompetitive conduct.

E. BellSouth's Anticompetitive "Win-Back" Practices Harm Local Competition

Another significant factor impeding the development of local competition and demonstrating that BellSouth's Application is not in the public interest has to be the anticompetitive "win-back" practices in which BellSouth engages.

Numerous examples of improper win-back practices by BellSouth were detailed in the Georgia/Louisiana 271 proceeding.[90] US LEC described a proceeding before the Tennessee Regulatory Authority ("TRA") regarding the BellSouth Select program.[91] Since the release of the *Georgia/Louisiana 271 Order*, the TRA issued a decision in the matter, and fined BellSouth the statutory maximum of $169,200 for numerous violations.[92]

The Commission's response in the *Georgia/Louisiana 271 Order* was to defer review of such win-back practices to the appropriate state commissions.[93] This response places the onus on competitors, consumer advocates, and state commissions to police overt anticompetitive conduct by BellSouth. The Commission's position effectively permits BellSouth to continue its

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90 *US LEC Georgia/Louisiana Comments* at 54-58.

91 *US LEC Georgia/Louisiana Comments* at 56.

92 *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00868, Final Order Affirming in Part and Vacating in Part the Initial Order of Hearing Examiner (Tenn. R.A. June 28, 2002).

93 "We find that, in the absence of a formal complaint to us that BellSouth has failed to comply with section 222(b), the winback issue in this case has been appropriately handled at the state level, and that the actions undertaken by the state commissions and BellSouth should be sufficient to ensure it does not recur." *Georgia/Louisiana 271 Order* at ¶ 303.

practice of "see what we can get away with until we get caught" that precludes obtaining Section 271 authority under any reasonable public interest standard.

Similar examples of anticompetitive win-back practices were provided to the NCUC. The NCUC responded by imposing restrictions on BellSouth's marketing practices.

> The Commission believes that the [CLECs'] concerns about BellSouth's allegedly aggressive winback tactics can be addressed by ordering that BellSouth adopt a similar winback policy which it has adopted in other states, specifically Louisiana. That policy shall include: BellSouth shall abstain from any marketing activities directed to a customer for seven days after the customer switches to another local telephone company; BellSouth's wholesale divisions are prohibited from sharing information concerning customer switches with its retail division; and BellSouth shall not include marketing information in the final bill sent to a customer that has switched providers.[94]

While state commission intervention is laudable, the fact that it is even necessary to rein in the anticompetitive win-back practices of BellSouth demonstrates that granting BellSouth's application is not in the public interest.

[94] NCUC Advisory Opinion at 44.

VI. CONCLUSION

For the foregoing reasons, US LEC Corp. urges the Commission to deny BellSouth's Application for Provision of In-Region InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina.

Respectfully submitted,

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